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IN THE
SUPREME COURT OF THE UNITED STATES

Hon. David F. Breck, Hon. William Lucas,
Hon. Michael Schwartz, Hon. George Montgomery
and Hon. Clayton Preisel,
Petitioners,

v.

State of Michigan, and Clerk for the County of Lapeer,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Michigan's mandatory retirement law for judges, which bars some judges from serving past the age of 70 years but permits other judges to serve until they are 76 years of age violate the Equal Protection Clause of the 14th Amendment?

Does the 6th Circuit's Decision conflict with the Court's prior rulings in *Gregory*, *Vance* and *Murgia*?

PARTIES TO THE PROCEEDING

Petitioners

Hon. David F. Breck, Hon. William Lucas, Hon. Michael Schwartz, and Hon. George Montgomery are all elected Michigan Circuit Court Judges. Hon. Clayton Preisel is an elected Michigan Probate Court Judge. Petitioners are individuals and have no corporate affiliations.

Respondents

State of Michigan and Clerk for the County of Lapeer.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 203 F.3d 392 (6th Cir. 2000). A copy of the Opinion is included in the Appendix at Appendix A at 1a - 11a. The Opinion of the District Court for the Eastern District of Michigan is published at 47 F.Supp.2d 880 (E.D. MI. 1999) and is included in the Appendix B at 12a - 28a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on February 10, 2000. This Petition for Writ of Certiorari is filed within 90 days of such Opinion. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment XIV,
Sec. 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Const. Art. 6, § 19 (3)

No person shall be elected or appointed to a judicial office after reaching the age of 70 years.

Michigan Compiled Laws 168.411

A person shall not be eligible to the office of judge of the circuit court unless the person is a qualified elector of the judicial circuit in which election is sought, as provided in section 11 of article 6 of the state constitution of 1963, is licensed to practice law in this state, and, at the time of election, is less than 70 years of age...

Michigan Compiled Laws 168.431

A person shall not be eligible to the office of judge of probate unless the person is a qualified elector of the county in which election is sought, as provided in section 16 of article 6 of the state constitution of 1963, is licensed to practice law in this state, ...and, at the time of election, is less than 70 years of age...

Michigan Compiled Laws 168.419

[T]he term of office for judge of the circuit court shall be six years, commencing at 12 noon on January 1 next following his election and shall continue until a successor has been elected and qualified.

Michigan Compiled Laws 168.439

> [T]he term of office for judge of probate shall be six years, commencing at 12 noon on January 1 next following his election and shall continue until a successor has been elected and qualified.

Michigan Compiled Laws 168.399

> The term of office of justice of the supreme court shall be 8 years, beginning on the first day of January next following the election and shall continue until a successor is elected and qualified.

STATEMENT OF THE CASE

Under Michigan law, some elected trial court judges may serve until they are 76 years of age. Supreme Court justices may serve until 78 years old. Persons aged older then 69 may not seek election to judicial office. This creates two groups of persons - "Essentially, Michigan law creates two categories of seventy to seventy-six year old people based on the relation of their birthdays to the day of election. A successful judicial candidate who becomes seventy years old after the election day could possibly serve until he or she becomes seventy-six years old." (Sixth Circuit Decision, Appendix A at 3a).

Otherwise qualified judicial candidates are prohibited from seeking office upon reaching their 70th birthday. Such persons, including two incumbent Petitioners, may find that

they are forced from judicial office as early as less then two months following their 70th birthday. Trial Judges elected even one day before their 70th birthday may serve their entire six year term, meaning they may hold judicial office as late as 76 years of age or 78 in the case of the Michigan Supreme Court.

Thus, judicial mandatory retirement in Michigan does not occur at a specific age, but rather "floats" between the ages of 70 and 78 years requiring some judges to leave offices several years before their colleagues.

This case is unique and cannot fall within the holdings of the prior decisions of the Court because Judges who remain as office holders into their mid-seventies versus those forced out at younger ages cannot be distinguished from one another on the basis of their title, employer or job duties. Aside from the merely fortuitous relationship between such persons' year, month and day of birth, and date of the election to fill a judicial vacancy the petitioners duties are freely interchangeable. There are no distinctions.

On November 23, 1998, Petitioners filed their first amended complaint for Declaratory and Injunctive relief before the United States District Court for the Eastern District of Michigan. The complaint sought a determination that Michigan's floating mandatory retirement scheme violated the 14th Amendment's guarantee of equal protection because there were no distinctions among the classifications created by the retirement law and that as such, it operated in a completely arbitrary fashion unsupported by any legal authority. (Appendix C at 29a).

The district court had jurisdiction over the original action pursuant to 28 U.S.C. § 1331 because the case

presented a federal question. Cross motions for Summary Judgment were filed. On May 4, 1999, the trial court granted the Respondents' motion. It found that the case was one of first impression but that the challenged law did not violate Petitioners' Equal Protection rights.

Petitioners filed a timely appeal with the Court of Appeals for the Sixth Circuit. On February 10, 2000, the Court of Appeals affirmed the District Court. The panel did not direct its analysis or attention to the fact 1) the duties performed by the Petitioners are freely interchangeable and not subject to classification based on same, 2) that mandatory retirement in Michigan is not based upon a particular age, single point in time, or line, but floats, creating a variable age upon which retirement is mandated.

ARGUMENT FOR GRANTING WRIT

I.
The Sixth Circuit's Decision Conflicts With The Court's Rulings In *Murgia, Vance* and *Gregory*

The Sixth Circuit's decision conflicts with the holdings of every mandatory retirement case decided by this Court, and in fact constitutes a complete evisceration of the Rational Means test.

The Court has visited the issue of mandatory retirement of public employees on three occasions. These decisions, described *infra,* stand for the proposition that 1) age is not a suspect classification, and therefore subject to the rational means test when challenged under the 5th or 14th Amendments. *Murgia, Vance.* 2) That distinctions among job duties, circumstances and goals of employees of different

employers are sufficient to justify classifications creating different specific ages of retirement for persons employed in different jobs. *Vance*. 3) Judges may be forced into retirement at a specific age despite the fact that non-judicial employees of the same state, may not. *Gregory*.

In each of these three prior decisions of the Court, the central themes were rationality of the classifications under attack and the specific age of retirement. The challenged Michigan law in the instant case is deficient in both of these respects.

Massachusetts v Murgia

Uniformed State Police Officers were required to retire at 50 years of age in *Murgia*. Other officers doing less demanding work were not required to retire. The Court noted that there was a distinction between the duties of those forced to retire at 50 and other officers. "It has never been seriously disputed, if at all, however, that the work of uniformed state officers is more demanding than that of other state, or even municipal, law enforcement personnel. It is this difference in work demands that underlies the job classification." *Massachusetts v Murgia*, 427 U.S. 307, 316, 96 S.Ct. 2562, 2568 (1976).

In addition to noting the logic in creating the classification, the Court recognized the practical difficulty in selecting that point in time upon which to make such a determination, observing that "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *(Emphasis supplied)*. *Id* at 314.

The *Murgia* case established that age based retirement of public employees will be reviewed in accordance with the

"rational basis" standard. It recognized that such a standard can be met by retiring persons with different job duties at different times, and that the task of "drawing of lines " should be accorded some deference.

Murgia does not support classifications without distinctions, nor does any case. Moreover, *Murgia* approves only of the use of a specific age cut off upon which to determine treatment of a rationally made distinction. The instant case uses neither a specific age cut off, or a distinction based upon any rational method.

Vance v Bradley

Just as the Sixth Circuit's decision does violence to the holding of *Murgia,* it similarly refused to decide the case in accordance with the next major holding from this Court, *Vance v Bradley*, 440 U.S. 93, 99 S.Ct. 939 (1979).

In *Vance*, "The issue presented is whether Congress violates the equal protection component of the Fifth Amendment's Due Process Clause by requiring retirement at age 60 of federal employees covered by the Foreign Service retirement and disability system but not those covered by the Civil Service retirement and disability system." *Id* at 94-95.

Consistent with the Court's analysis in *Murgia,* the opinion first examined if the classification was rationally based. Indeed, much of the holding is devoted to this very important issue.

> Congress has recognized the distinctive requirements associated with the conduct of the country's foreign relations and has provided personnel policies for the Foreign

> Service separate and apart from the general Civil Service system. Among other differences, Foreign Service officers have been subject to an earlier retirement age than is true in the Civil Service.

Vance v Bradley, 440 U.S. 93, 98, 99 S.Ct. 939 (1979).

The Court took pains to explain, as it did in *Murgia,* that the classification at bar were logically formulated and rested on understandable differences.

> Congress plainly intended to create a relatively small, homogeneous, and particularly able corps of Foreign Service officers. It was thought that the tasks performed by this corps were sufficiently demanding and important to the Nation that it was necessary to pursue more rigorous policies to ensure excellence then those generally applicable in the Government. There is no selection-out system in the Civil Service, for example; the competitive examination process is not generally as rigorous; and there are far wider variations in the nature of the various Civil Service positions and personnel.

Vance v Bradley, 440 U.S. 93, 101-102, 99 S.Ct. 939 (1979).

The Court went on to state the point in several ways throughout the opinion. The classification was rational. "[T]he latter (Foreign Service Officers) are trained for and experienced at performing tasks in the Foreign Service; they are not freely interchangeable with Civil Service employees." *Id* at 107.

In accepting the classification between Foreign Service Officers and Civil Service employees as rational, the Court noted that the task of determining an age involved the "drawing of lines" which do not require "mathematical niceties." *Id* at 108. The Court noted that "We accept such imperfection because it is in turn rationally related to the secondary objective of legislative convenience" and that

> Congress was entitled to conclude that certain groups of employees share more characteristics with Foreign Service officers than with Civil Service personnel even though not serving for as long in as important overseas posts, and that other employees share more characteristics with Civil Service personnel than with Foreign Service officers.

Id at 109.

Thus, the "drawing of lines" approved of in that case was the specific age of 60, and not a floating range of ages. Moreover, the specific age cutoff was upheld because the groups to which it applied to or did not apply to were subject to classification based upon the differences in their jobs. Neither of these aspects can be found in the instant case. The Sixth Circuit ignored such factors and by doing so, abrogated the precedent of the Court.

Gregory v. Ashcroft

The final case in this triumvirate of holdings is *Gregory v Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395 (1991). There, the Court examined Missouri's requirement imposing a uniform bright line age disability of 70. The challenged

state constitutional provision was the opposite of the challenged law in this case:

> Article V, § 26, of the Missouri Constitution provides that "[a]ll judges other than municipal judges shall retire at the age of seventy years.

Id at 455.

The *Gregory* equal protection argument was predicated on the fact that other, *non-judicial,* state employees were not subject to mandatory retirement at 70. 111 S.Ct. at 2406. The Court stated the issue:

> They claim that the mandatory retirement provision makes two irrational distinctions: *between judges who have reached age 70 and younger judges, and between judges 70 and over and other state employees of the same age who are not subject to mandatory retirement.* (*Emphasis supplied*).

Id at 470.

Thus, two independent distinctions were made in Missouri based first upon age, and next upon job duties. These classifications were examined.

The classification based upon age alone, that is judges over 70 versus those younger then 70 was analyzed by the Court, and found to be rational.

> The statute draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal

> demand for the highest caliber of judges in the system; the statute . . . draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not; mandatory retirement increases the opportunity foı qualified persons . . . to share in the judiciary and permits an orderly attrition through retirement; such a mandatory provision also assures predictability and ease in establishing and administering judges' pension plans.
>
> * * *
>
> It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age. (*Emphasis supplied. Citations omitted).*

Gregory at 471-472.

The Michigan law is inapposite because there is no fixed age for retirement. Here, the Court accepted the classification of those older then 70 as a rational, if not correct, response to a perceived problem. Therefore, that aspect of the law was predicated on a rational basis.

Likewise, the second distinction in *Gregory* was rationally based. Other public employees in Missouri were not subject to mandatory retirement. The Court explained:

> Judges' general lack of accountability explains also the distinction between judges and other state employees, in whom a deterioration in performance is more readily discernible and who are more easily removed.

Id at 473.

Here, the Michigan judges are subject to a much more onerous and serious violation of their rights. The distinction between favored and disfavored persons is not based upon one's age or a distinction in employment as in *Gregory*. Indeed, the favored person *vis a vis* Judge Breck is an *older judge*, not a younger or non-judicial employee of the state as was the case in *Gregory*.

To carry out a rationally based classification requires a definitive point in time to create the classification. A varied set of ages based upon luck is no classification at all -- mere happenstance. The "point in time" aspect of the Missouri law was specifically relied upon by the Court as it observed:

> The Missouri mandatory retirement provision, like all legal classifications, is founded upon a generalization. It is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all. . . The people of Missouri rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternative for removal sufficiently inadequate, that they will *require all judges to step aside at age 70*.(*emphasis supplied*).

Gregory v Ashcroft, 111 S.Ct. 2395, 2407-2408 (1991).

The "drawing of a line" at 70 is the beacon of difference with the instant case. It renders the classification as a necessary but rational evil which is overinclusive to a degree. Such logic is not present in the case of a floating,

variable or sliding scale like that of Michigan law. Michigan's goal is no where as clear as in Missouri. We know as a certainty that age 70 is not a cut off for all Michigan judges. Given the presence of 6 and 8 year terms, it is a logical fact that most judges will have the opportunity to serve into their 70s. Second, in *Gregory* and the other reported cases, all judges were subject to retirement at the same age, not an eight year variation as is possible under Michigan law.

Had the Missouri law functioned as Michigan's, by allowing almost all judges the opportunity to serve past 70 and eliminating some based upon the judge's date of birth in relationship to an election to a six or eight year term, the Court's rationale could not have been employed to justify *that relationship.*

The sum and substance of these three important holdings, *Murgia*, *Vance* and *Gregory,* is that mandatory retirement at 50, 60 or 70 *based upon a uniform retirement age* is not a violation of equal protection if these ages are applied to a classification which is rationally formed. These cases differ from Michigan law as none of the disfavored class were part of an identical group in which older persons with the identical job were permitted to continue.

Michigan's law is instead a grate which terminates the position of some while allowing other persons performing the precisely same job immunity from forced retirement for an additional six years.

Kimel v Florida Board of Regents

Earlier this year, the Court decided *Kimel v Florida Board of Regents*, 120 S.Ct. 631 (2000). That case, again,

places in high relief, the infirmities in Michigan's law and the Sixth Circuit decision. *Kimel* surveyed the three prior decisions of the Court. It reviewed the holding of each case as one in which a specific "bright line" retirement date was imposed upon a person for whom such retirement might not be needed from a job performance standpoint. *Id* at 646.

The Court noted that the *classifications* at issue need not be made with "razorlike precision." *Id.* Such classifications will be upheld " unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational. "*Id.*

Unlike the instant case, and consistent with the prior holdings of this Court, the use of a specific age was approved as a practical aspect of the legislative process.

> Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. *That age* proves to be an inaccurate proxy in any individual case is irrelevant. *(Emphasis supplied).*

Id at 646.

1. Michigan's Classifications Are Not Rational. There Are No Distinctions Between The Favored and Disfavored Groups and The Age Of Mandatory Retirement For Michigan Judges Floats Over A Six Year Range.

A. Michigan's Classifications Are Separations Without Distinctions.

In the same courthouse in Michigan, a judge having just celebrated his 70th birthday must pack his personal belongings and retire while one floor above his colleague at 75 years of age remains on the bench for another year.

As described in the cases cited above, the Court has deferred to law makers in forming classifications between persons when the job duties differ and support the classification, even when the distinctions are tenuous or speculative.

Judges who may serve up to six years longer (or eight in the case of Supreme Court justices) perform the identical job. Often they are members of the same local court, working from the same courthouse separated by a floor or wall. They cannot be distinguished from one another on the basis of what they do or for whom they do it. The Court's prior decisions require that the classification represent a difference, some difference. There are no differences in the jobs carried out by the judges herein. *Cf, Murgia, Vance and Gregory*.

Moreover, these same judges cannot even be classified on the basis of their age. Petitioner Lucas may serve until 74 years of age. Petitioners Breck and Montgomery until just days after becoming 70. (Amended Complaint, Appendix 29a-32a). The favored and disfavored persons are not the younger versus older populations as in the Court's prior cases.

What distinguishes the classifications in Michigan is luck of the draw. The determination of whether an individual

can serve as judge until 76 years of age is not based upon his job duties, *or even his or her age,* but how one's date of birth aligns with the date of an election.

Indeed, the Sixth Circuit's decision fails to state how the supposed goals of the law are rationally reached by the classification. It held:

> Even if the election eligibility laws were insufficiently related to preserving the competency of the judiciary, the laws are rationally related to other state purposes such as promoting judicial efficiency and reducing partisan appointments of judges. Disqualifying judicial candidates over sixty- nine years of age promotes judicial efficiency by avoiding the disruption in litigation from reassigning cases because of mid-term judicial vacancies, assuming an alternate mandatory age-retirement scheme. Further, the laws also avoid the additional cost of conducting special judicial elections. Moreover, limiting candidates to those who are able to serve an entire term, again assuming alternative mandatory age retirement, furthers the electorate's choice of its judges by reducing the necessity of filling mid-term judicial vacancies from mandatory retirements with partisan gubernatorial appointments.

(Appendix A at 11a).

The Sixth Circuit merely listed possibly legitimate benefits which can be derived from <u>any</u> system which culls the herd. It ignores the requirement that the *classification*

must be rationally formed. *Gregory v Ashcroft, supra, Vance v Bradley, supra, Massachusetts v Murgia, supra.* If Michigan's law was predicated on a roll of the dice requiring all judicial candidates to throw a six or 12, it would be no less effective at reaching all of the goals cited by the lower court. It would not be, however, a form of classification which emanates from a rational basis. That is why the holdings in prior cases from this Court are dispositive of the issue. This Court has always examined the classification to determine if there was some possible rational basis, whether true in fact or not. *City of Cleyburne v Cleyburne Living Center,* 473 U.S. 432 , 446, 105 S.Ct. 3249 (1985).

Are Michigan's classifications any more rationally calculated to reach the objective then a means based upon whether a judge is a Pisces or Libra? Merely culling the group of experienced judges like thinning a herd of deer by arbitrarily shooting every third doe may be effective in reducing a population but is far too logically remote to be constitutional. Only rational distinctions and a single age delineating the classification treating all persons of the same age in the same way reaches constitutional standards. *Gregory v Ashcroft, supra.*

This floating, sliding and variable age cut off is the *logical opposite of a rational classification*. Permitting some 70 - 76 year olds to soldier on in judicial office while putting others out to pasture fails to provide a rational link related to eliminating persons 70 and older from holding judicial office and fails the test stated by *Gregory v Ashcroft*.

Indeed, the Michigan law is so logically flawed that it fails to provide a rational mechanism to achieve *any* permissible goal. It does not rationally eliminate those over 70, because it allows many over 70 to serve. It does not

rationally eliminate only those aged 76 because it bars many persons younger then 76 from serving.

II.
The Rational Basis Test Should Not be Rendered Toothless by The Sixth Circuit. Fortuitous Classifications Fail the Test

The Sixth Circuit's myopic misapplication of the rational basis test caused it to focus exclusively on the supposed benefits to the State of Michigan by thinning the population of judges and ignoring the casino like method by which the thinning occurs.

This Court has struck down legislation where the classifications created are not subject to rational distinction. Justice Blackman has said the rational basis standard is "not a toothless one." *Logan v Zimmerman Brush Company*, 455 U.S. 422, 438; 102 S.Ct. 1148, 1159 (1982, Blackmun J. writing separately). In that case, the Court struck down an Illinois law which treated similar disability claims in dissimilar manner. The state failed to conduct fact finding reviews within a statutorily defined period causing certain cases to be dismissed. Justice Blackmun's separate concurring opinion noted that there must be an "objective basis" for disparate treatment.

> Finally, it is possible that the Illinois Supreme Court meant to suggest that the deadline contained in ¶ 858(b) can be justified as a means of thinning out the Commission's caseload, with the aim of encouraging the Commission to convene timely hearings. This rationale, however, suffers from the defect outlined above: *it draws an arbitrary line*

> *between otherwise identical claims. In any event, the State's method of furthering this purpose--if this was in fact the legislative end--has so speculative and attenuated a connection to its goal as to amount to arbitrary action. The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis.* That is not so here. (*Emphasis supplied*).

Id at 455 U.S. 442.

Another case in which the Court struck down a state law which was based upon an irrational classification was *Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465 (1985). In *Williams*, persons who were Vermont residents at the time that they purchased a vehicle and paid a sales tax to another state did not have to pay use tax when they registered the vehicle in Vermont, while persons who were not Vermont residents at the time they purchased a vehicle and paid a sales tax to another state did have to pay the use tax when they registered the vehicle in Vermont. Plaintiff, Mr. Williams, had lived in Illinois, purchased a vehicle, paid Illinois tax and moved to Vermont three months later. *Id at* 17. The Supreme Court focused on the "burdens" borne by the favored and disfavored groups, noting: "To free one group and not the other from the otherwise applicable tax burden violates the Equal Protection Clause." *Id at* 27.

As with the Sixth Circuit's analysis of Michigan law, the Vermont law was presumed to reflect a legitimate state goal. Vermont's desire to improve and maintain the state and interstate highway systems, and to pay the principal and

interest on bonds issued for the improvement and maintenance of those systems could not, however, justify a classification which was arbitrary. *Id.* at 18. The issue was whether the distinction rationally served the goal. The Court determined that the distinction made by the Vermont statute did not rationally serve such legitimate purposes inasmuch as residence at the time of purchase is a wholly arbitrary basis on which to distinguish among Vermont registrants. *Id.* at 23-24. The Court explained that the purpose of the statute would be identically served by taxing the registrants without making the distinction as to residence. *Id.* Without stating expressly, the Williams Court articulated the same idea supporting the approval of the laws in *Murgia, Vance and Gregory.* Distinctions among persons must be made on a arguably logical basis. A classification based only upon state of residence is not sufficiently rational to support the classification. Equality before the law is a paramount value. "appellants have not been "accorded equal treatment, and the inequality is not because of the slightest difference in [Vermont's] relation to the decisive transaction, but solely because of the[ir] different residence." *(Citation omitted). Id at* 24. The rationale of the Court in finding that Vermont law deprived Mr. Williams of equal protection was consistent with its holdings in other cases which approve of distinctions applied evenly across the board. Indeed, the "equality" the Williams Court heralded refers to the application of the classification. Although Patrolman Murgia was fit, he was treated equally with all other state patrolmen in Massachusetts. Likewise, the Foreign Service Officers forced into early retirement in *Vance* were all treated the same. The judges in *Gregory* all received equal treatment. In each case, the same event at the same age occurring to people within the same classification.

Michigan's judges are not accorded equal treatment under the law because the classification is so attenuated from the goals as to amount to randomness. The Court has not, nor should it approve of such lottery like classes.

The Court has held the *degree* of disparate treatment is a factor to be considered in evaluating classifications under an equal protection analysis. *Allegheny Pittsburgh Coal Company v County Commission of Webster County*, 488 U.S. 336, 109 S.Ct. 633 (1989). The luck based arbitrary classification suffered by Michigan judges can yield a six year variation in potential judicial service. This is a significant period not to be tolerated as a necessary but unpleasant rough approximation of means to reach a goal. For example, in a case involving tax assessments of coal mining property in West Virginia, the local tax assessor had used prior sales to establish value of recently sold properties, but in the cases of properties without recent sales histories, utilized percentage based increases that did not correlate with sales of comparable properties. The resulting two groups of properties, those assessed on actual sales prices, and those without recent sales data caused the former group to be assessed at eight to thirty five times higher values then the latter group. *Id at* 488 US 340-341. The Court noted the legitimacy of the state goals and that either method used by the assessor was rational. "That two methods are used to assess property in the same class is, without more, of no constitutional moment". *Id at* 343. Nonetheless, the Court found a violation of equal protection because the impact of the tax methods was borne so unequally between the members of the respective classes. It is this *objective comparable disparity* that brings the disfavored class into high relief against the backdrop of the favored class. This comparative disparity within otherwise identical groups is so objectively unfair as to deny equal protection. The Court noted that the *impact* of the questioned

means is the key question. "[I]t is not theory, but the impact . . . that counts" *Id at* 344, *citation omitted.*

> But their complaint is a comparative one: while their property is assessed at 50% of what is roughly its current value, neighboring comparable property which has not been recently sold is assessed at only a minor fraction of that figure. . . . We hold that the assessments on petitioners' property in this case violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, . . .

Id at 343.

The Court went on to note that the purpose of the equal protection clause is simply objective fairness.

> 'The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *(Citation omitted)* . . . But the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings.

Id at 345-346.

Equating a human being's right to pursue his career in public service with mere taxation on real property rivets the point. Disparate treatment of similar property by the state is

not tolerable under guarantees of equal protection. Allowing some judges up to six additional years to serve, the duration of a term, while disenfranchising Petitioners can be no less disparate, and unconstitutional.

Another case in which the classification was one without distinction was *City of Cleyburne v Cleyburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249 (1985). The Court struck down a zoning ordinance which required a special use permit for a group home for the mentally challenged. In finding the classification to be without rational distinction, the Court held: "Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us." And, in determining the vitality of the rational basis test to the case, the Court observed that the analysis is not as dead as the Sixth Circuit would have us believe:

> To withstand equal protection review, . . . [t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. (*Citations omitted).*

Id at 446.

Cleyburne is another example of this Court requiring that classifications be made upon a rational basis. Such a rational basis cannot be found in this case. There is no distinction between a Michigan judge forced into retirement at 70 and another at 76, except for the good or bad luck of each. The fact that the State may realize benefits is without relevance. The same benefits may be found by rolling dice, or running the gauntlet. It is the *classifications* that are of

constitutional moment. It simply makes no sense to allow some persons an extra six years of judicial eligibility based only upon the relationship of the date of one's birth to the election date.

The underlying theme in all equal protection cases goes to the classifications employed by the legislature. In every case in which the classification is arbitrary, the law must fall. In cases in which the classification is arguably linked to a legitimate goal, then the law may stand. Examples of both abound above.

CONCLUSION

In Michigan, a judge is mandatorily retired from office while his colleague continues for six or eight years longer. At 70, one is too old, but at 75 years of age, another is not. There are no differences between them -- except for lottery of fate. The judge who continues service does so not because he is different from his or her brethren. It is as simple as the coalescence of month and day of birth, year of birth and date of election in the right combination -- Las Vegas brought to judicial elections. An eligible candidate born November 8, 1930 running for an election which will take place November 7, 2000 nets a judicial career that ends on January 1, 2006, at 76 and 53 days old. Petitioner Breck was born October 31, 2000. He will celebrate his 70th birthday seven days before the election he wishes to run in, but cannot . His career will as an elected judge stops then. Others, will continue on for years in office. (Amended Complaint, Appendix C at 29a).

This fortuity based classification and variable age based float has not been addressed by the Court and is contrary to the age based plans approved in cases decided by the Court. It is inconsistent with the holdings of every

mandatory retirement case decided. The Sixth Circuit's decision represents no less then the abandonment of the rational basis test in mandatory retirement cases and total disregard of this Court's rational basis cases. If the Sixth Circuit decision stands, the rational basis test falls.

For the above reasons, Petitioners believe that this case represents important questions of federal constitutional law and will allow for the resolution of the conflict existing between the decisions Court and that of the lower court herein. Petitioners respectfully request the petition for the writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

[Filed February 10, 2000]

No. 99-1628

Hon. David F. BRECK; Hon. William Lucas; Hon. Clayton E. Preisel; Hon. Michael Schwartz; Hon. George E. Montgomery, *Plaintiffs-Appellants*,	)
v.	)
STATE OF MICHIGAN; Michigan Department of State; Michigan Bureau of Elections; Candice Miller, Secretary of State, Chief Elections Officer; Marlene M. Bruns, Clerk for the County of Lapeer, *Defendants-Appellees*.	)

Before: NELSON, SUHRHEINRICH, and GILMAN, Circuit Judges.

OPINION

SUHRHEINRICH, Circuit Judge.

Plaintiffs, five Michigan state judges, appeal a summary judgment for Defendants, State of Michigan and various state agents, on Plaintiffs' federal equal protection challenge to state laws that render them ineligible for re-election because of their age.

I. BACKGROUND

Plaintiffs-Appellants are several State of Michigan circuit and probate judges contemplating re-election who will be seventy years old on the election days for the judicial offices that they seek. Plaintiffs are Judges David F. Breck, William Lucas, Clayton E. Preisel, Michael Schwartz, and George E. Montgomery. Defendants-Appellees are the State of Michigan, Michigan Department of State, Michigan Bureau of Elections, Secretary of State Candice S. Miller, and Marlene M. Bruns, County Clerk for the County of Lapeer. Individual Defendants are variously involved in maintaining and implementing state laws that render Plaintiffs ineligible because of their age to stand for election to judicial office.

The State of Michigan does not require its judges to retire at a certain age. Rather, the Michigan State Constitution renders ineligible for election to a judicial office anyone who is at least seventy years old on the election day for that judicial office: Justices and judges of courts of record must be persons who are licensed to practice law in this state. No person shall be elected or appointed to a judicial office after reaching the age of 70 years." Mich. Const. art. 6,

§ 19. One implementing statute denies eligibility to the office of circuit court judge to anyone older than sixty- nine on the day of election:

> A person shall not be eligible to the office of judge of the circuit court unless the person is a qualified elector of the judicial circuit in which election is sought, as provided in section 11 of article 6 of the state constitution of 1963, is licensed to practice law in this state, and, at the time of election, is less than 70 years of age.

Mich. Comp. Laws § 168.411 ("§ 411"). A similar statute applies to probate court judges. See Mich. Comp. Law § 168.431 ("§ 431"). The judicial terms for Michigan circuit and probate judges are six years. *See* Mich. Comp. Laws §§ 168.419 (circuit judges), 168.439 (probate judges).

Essentially, Michigan law creates two categories of seventy to seventy-six year old people based on the relation of their birthdays to the day of election. A successful judicial candidate who becomes seventy years old after the election day could possibly serve until he or she becomes seventy-six years old. However, a person who is seventy years old on the election day for a judicial office is simply ineligible for election to that judicial office. Plaintiffs sued because they will be seventy years old on election day and, therefore, ineligible.

Plaintiffs requested a declaratory judgment that section 19 of article 6 of the Michigan Constitution of 1963 and sections 411 and 431 of the Michigan Compiled Laws are

unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 2. Plaintiffs claim that the constitutional and statutory age restrictions are not rationally related to the goal of preserving judicial competence by eliminating judges who are over sixty-nine years old.

After the parties filed cross motions for summary judgment, the district court granted summary judgment to Defendants. The district court reasoned that the challenged state laws did not violate the Plaintiffs' rights to equal protection because the laws were rationally related to legitimate state objectives of preserving judicial competency and enhancing administrative efficiency by reducing the disruption of mid-term judicial vacancies (assuming the existence of a mandatory age retirement alternative) and promoting the electorate's preferences by reducing the need for partisan gubernatorial appointments.

II. DISCUSSION

Plaintiffs concede that preserving the competency of the judiciary by eliminating older judges may be a legitimate goal of the state. However, they contend that the laws are not rationally related to this goal because they eliminate only those people who turn seventy on or before the election but not those who are sixty-nine or younger on the election day and could possibly serve until they are seventy-six years old.

Defendants respond that Michigan's age-eligibility election laws are sufficiently related to preserving judicial competency because under rational basis review the Equal Protection Clause does not require absolute precision in classifying otherwise similarly situated groups where distinctions are warranted. Defendants also maintain that the age-eligibility election laws are rationally related to other legitimate state goals, such as promoting administrative efficiency by eliminating the disruption of mid-term vacancies (assuming an alternate mandatory age retirement scheme) and advancing the voters' choice of judicial candidates by reducing the opportunity for mid-term gubernatorial appointments.

This Court reviews *de novo* a trial court's grant of summary judgment. *See Brooks v. American Broadcast Cos.*, 932 F.2d 495, 500 (6th Cir.1991). Summary judgment may be granted if there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law. *See Maddox v. University of Tennessee*, 62 F.3d 843, 845 (6th Cir.1995). We agree with the Defendants and affirm the decision of the district court for the following reasons.

Rational basis scrutiny applies to equal protection challenges to mandatory age-retirement statutes. *See Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). In *Gregory*, the plaintiffs, state judges, challenged the Missouri Constitution's mandatory retirement provision for judges at age seventy. After litigation in the Missouri state courts, the United States Supreme Court applied rational basis scrutiny and found that the Missouri Constitution did not violate the Equal Protection Clause. The Supreme Court applied rational basis scrutiny because age is not a suspect

classification under the Equal Protection Clause and because candidacy for judicial office does not implicate any fundamental right. *See id.* at 470, 111 S.Ct. 2395.

The Sixth Circuit addressed a case very similar to the present case and also applied the rational basis test. *See Zielasko v. State of Ohio*, 873 F.2d 957 (6th Cir.1989). In *Zielasko*, the Ohio Constitution prohibited people over sixty-nine years old from standing for election to judicial office. This Court applied rational basis scrutiny:

> [T]he threshold question in deciding an equal protection claim is to decide the appropriate level of scrutiny to apply to the restriction or classification at issue. In most cases distinctions and classifications "need only be drawn in such a manner as to bear some rational relationship to a legitimate state end." Departure from this rational relationship test is permitted "only when the challenged statute places burdens upon 'suspect classes' of persons or on a constitutional right that is deemed to be 'fundamental.'" In such an instance courts are to apply strict scrutiny, that is, "'scrutiny' more vigorous than that which the traditional principles would require." The district court correctly found that the rational relationship test was applicable to this case because age is not a "suspect" classification, and because, contrary to *Zielasko* and Bowman's assertions, running for office is not a "fundamental right."

Id. at 959 (citations omitted). The present case involves both candidacy for judicial office and a candidate's age. Accordingly, we will apply rational basis scrutiny to Plaintiffs' equal protection claim.

Rational basis scrutiny, a deferential review, only requires a state of facts that provide a conceivable basis for the classification. *See Allied Stores v. Bowers*, 358 U.S. 522, 530, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959). To withstand constitutional review, the classification simply must be rationally related to the goal or purpose of the classification. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). Rational basis review does not assess the wisdom of the challenged regulation. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (noting that the Court did not assess the wisdom of requiring police officers to retire at age fifty-five); *see also Stiles v. Blunt*, 912 F.2d 260, 267 (8th Cir.1990) (applying rational basis review to Missouri's minimum age requirement for state legislative office while withholding the court's own evaluation of the law's wisdom). Further, whether the identified legitimate state interests were actually considered in establishing the prohibition is irrelevant. *See Flemming v. Nestor*, 363 U.S. 603, 612, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); *Zielasko*, 873 F.2d at 961. Likewise, whether a legislature "was unwise in not choosing a means more precisely related to its primary purpose is irrelevant." *See Vance v. Bradley*, 440 U.S. 93, 109, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979) (*citing Califano v. Jobst*, 434 U.S. 47, 56-58, 98 S.Ct. 95, 54 L.Ed.2d 228 (1977)).

In *Gregory*, the Supreme Court recognized any one of the following objectives as a sufficient rational basis to sustain a mandatory retirement provision for judges against an equal protection challenge: (1) avoiding tedious and difficult individualized review of physical and mental qualifications; (2) increasing opportunity for judicial office and orderly attrition through retirement; and (3) promoting predictability and ease in administration of pension plans. *See Gregory*, 501 U.S. at 471-72, 111 S.Ct. 2395.

In applying rational basis scrutiny in *Zielasko*, this Court recognized mandatory retirement as rationally related to several legitimate state interests such as creating openings for younger judges, easing court dockets by creating a pool of part-time judges, and reducing age-related incompetence of some older judges. *See Zielasko*, 873 F.2d at 961 (*citing State ex rel. Keefe v. Eyrich*, 22 Ohio St.3d 164, 489 N.E.2d 259 (1986)).

In the present case, Defendants simply must show that the age limitation on election eligibility is rationally related to a legitimate public purpose. Plaintiffs argue that the age-eligibility election laws violate the Equal Protection Clause because they are not rationally related to the state's interest in preserving judicial competency by eliminating candidates who are over sixty-nine years old. Clearly, the laws only prohibit the election of people who are already seventy but do not prohibit the election of candidates who are sixty-nine or younger and might serve until they are seventy to seventy-six years old. Nevertheless, Plaintiffs' arguments are not persuasive for several reasons.

The age-eligibility election laws are sufficiently rationally related to preserving the competency of the Michigan judiciary. Rational basis scrutiny of an equal protection challenge tolerates some imprecision in classifying otherwise similarly situated people where a state has determined that some distinction is warranted. *See Gregory*, 501 U.S. at 473, 111 S.Ct. 2395 (a state "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect" (*quoting Murgia*, 427 U.S. at 316, 96 S.Ct. 2562, in turn *quoting Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970))). In *Murgia*, the Court applied rational basis scrutiny and upheld the mandatory retirement of state police officers at age fifty over an equal protection challenge. The Court commented "that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." *Murgia*, 427 U.S. at 314, 96 S.Ct. 2562 (*citing Dandridge*, 397 U.S. at 485, 90 S.Ct. 1153). In *Vance*, 440 U.S. at 109, 99 S.Ct. 939, the Court again applied rational basis scrutiny and upheld mandatory retirement for federal Foreign Service employees over an equal protection challenge. The *Vance* Court acknowledged and accepted some imprecision in the classification:

> Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this "perfection is by no means required." The provision "does not offend the Constitution simply because the

> classification 'is not made with mathematical nicety. . . .'"

Vance, 440 U.S. at 108, 99 S.Ct. 939 (citations omitted).

Further, the Supreme Court has recognized and accepted that some classifications have unnecessary and harsh results. In *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), aliens were denied federal aid because they did not satisfy a residency requirement. The Court upheld the eligibility requirements:

> [I]t remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences. . . . The task of classifying persons . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of that line; the differences between the eligible and ineligible are differences in degree rather than differences in the character of their respective claims. When this kind of policy choice must be made, we are especially reluctant to question the exercise of congressional judgment.

Id. at 83-84, 96 S.Ct. 1883. *See also Zielasko*, 873 F.2d at 961-62.

For analysis of the present case, we assume, but do not assess or necessarily endorse, the wisdom of the State of Michigan in attempting to promote the competency of its

judiciary by eliminating candidates who are over sixty-nine years old. We also recognize that the election eligibility laws are not precisely or evenly tailored to eliminate such judges. Nevertheless, we find that the election eligibility laws are rationally related to preserving the competency of the judiciary.

Even if the election eligibility laws were insufficiently related to preserving the competency of the judiciary, the laws are rationally related to other state purposes such as promoting judicial efficiency and reducing partisan appointments of judges. Disqualifying judicial candidates over sixty- nine years of age promotes judicial efficiency by avoiding the disruption in litigation from reassigning cases because of mid-term judicial vacancies, assuming an alternate mandatory age-retirement scheme. Further, the laws also avoid the additional cost of conducting special judicial elections. Moreover, limiting candidates to those who are able to serve an entire term, again assuming alternative mandatory age retirement, furthers the electorate's choice of its judges by reducing the necessity of filling mid-term judicial vacancies from mandatory retirements with partisan gubernatorial appointments. *See* Mich. Comp. Laws §§ 168.404, 168.409j, 168.424, 168.444, 168.467m. Because the election eligibility laws are rationally related to these objectives, the laws do not violate Plaintiffs' rights to equal protection.

III. CONCLUSION

Accordingly, we AFFIRM the district court's grant of summary judgment to Defendants.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed May 4. 1999]

No. 98-CV-74677

Hon. David BRECK, Hon. William Lucas, Hon. Clayton E. Preisel, Hon. Michael Schwartz, and Hon. George E. Montgomery, *Plaintiffs*,	)
v.	)
State of MICHIGAN, Michigan Department of State, Bureau of Elections, Secretary of State Candice Miller, Chief Elections Officer, and Marlene M. Bruns, Clerk for the County of Lapeer, *Defendants*.	)

OPINION AND ORDER

FEIKENS, District Judge.

Introduction

Plaintiffs, the Hon. David Breck, the Hon. William Lucas, the Hon. Clayton E. Preisel, the Hon. Michael Schwartz, and the Hon. George E. Montgomery, (collectively "the judges") have relied upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to challenge the legitimacy of a Michigan election law that will disqualify them on the basis of age from seeking re-election to state judicial office. I hold that their constitutional claim does not win them the opportunity for re-election they seek.

I. Background

Plaintiffs are state judges who will have attained the age of seventy years before the election date for what could have been their next six-year terms. The current terms for Circuit Court Judge Breck, Probate Court Judge Preisel, and Circuit Court Judge Schwartz expire on January 1, 2001; to seek a following term, their names would need to be placed on the ballot for the November 7, 2000 election. The current terms for Circuit Court Judges Lucas and Montgomery expire later, on January 1, 2003; to seek a following term, their names would need to be placed on the ballot for the November 5, 2002 election.

Michigan election law, however, prohibits each of these judges from running for re-election because each will have attained the age of seventy years before his next possible election date. Article VI, section 19 of the Michigan Constitution provides that "[n]o person shall be elected or appointed to a judicial office after reaching the age of 70

years." The enacting statutory provision for circuit court judges accordingly states: "A person shall not be eligible to the office of judge of the circuit court unless the person . . . at the time of election, is less than 70 years of age." Mich. Comp. Laws Ann. § 168.411 (West 1989) (emphasis added). An identical statutory provision exists for probate court judges. *See* Mich. Comp. Laws Ann. § 168.431 (West 1989).

On October 28, 1998, the judges filed their complaint,[1] alleging that the Michigan election law for state judicial candidates violates their right to equal protection under the Fourteenth Amendment. In answers filed on November 23, 1998, defendants State of Michigan, Michigan Department of State, Bureau of Elections, Secretary of State Candice Miller, Chief Elections Officer, (collectively "the State" or "the State of Michigan") and Marlene M. Bruns, Clerk for the County of Lapeer, denied that Michigan election law violates the Fourteenth Amendment.

The parties have filed cross-motions for summary judgment. The judges argue that Michigan election law violates the Fourteenth Amendment because it creates an irrational classification that allows some, but not all, judges older than seventy to hold office. The State and Ms. Bruns both counter in separate motions that Michigan election law is constitutional because, while admittedly imperfect, it is nevertheless a rational means for achieving the legitimate goals the State has for its judiciary. The State also contends

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[1] This original complaint named only Judges Breck, Lucas, Preisel, and Schwartz as plaintiffs. On November 23, 1998, the judges filed an amended complaint that added Judge Montgomery as a named plaintiff.

that the judges' suits suffer from three justiciability defects: first, that the judges lack standing; second, that the judges' suits are not yet ripe; and, third, that the judges' claim does not merit the exercise of my discretionary jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

II. Analysis

Federal Rule of Civil Procedure 56(c) guides my analysis. It provides that a summary judgment shall issue "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." What is in dispute is a single question of law. My sole task is to determine how the law is to be applied.

A. Standing

Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." The doctrine of standing determines which disputes satisfy this "case or controversy" requirement. *See Allen v. Wright*, 468 U.S. 737, 750-752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (discussing standing's relationship to Article III). Thus standing can be described as a test used "to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990).

The Supreme Court has determined that "the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). First, plaintiff must demonstrate an "injury in fact" – an "invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent." *Id.* Second, plaintiff must demonstrate "a causal connection between the injury and the conduct complained of"; in other words, the injury must be "fairly trace [able] to the challenged action of the defendant." *Id.* And, third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561, 112 S.Ct. 2130. To obtain a summary judgment, plaintiff has the burden of proving by evidence of "specific facts" that these elements are met. *Id.*

The State argues that the judges lack standing because they have failed to meet this evidentiary burden with respect to Lujan 's injury-in-fact element.[2] The State claims that the judges' alleged injury -- unconstitutional disqualification from eligibility for state judicial office -- is too speculative because intervening events between now and the next set of elections, such as illness, death, or the actions of independent third parties, could render some, or all, judges unable to seek re-election. The judges argue that they have fulfilled their injury-in-fact burden of proof because they have filed

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[2] The State does not contest the causation and redressability elements of the Lujan test. From my review of the pleadings, motions, briefs, and evidence before me, I find that the judges have satisfied their burden of proof with respect to these two elements.

affidavits that evidence their intent to seek re-election.[3] The judges note that there can be no dispute with the certain fact that Michigan election law, as it applies to them, will disqualify them from attempting re- election bids.

The State's argument primarily relies on *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969), a decision issued well before today's standing doctrine was fully developed by the Supreme Court. In *Golden*, the plaintiff, who had been prohibited during a past election from distributing handbills attacking an incumbent congressional candidate, threatened again to distribute illegal handbills if the same candidate ran in an upcoming election. *See id.* at 109, 89 S.Ct. 956. During the course of the case, it became clear that the targeted candidate was no longer a United States Congressman, was instead a judge, and had no plans to run for Congress in the next election. *See id.* The Court held that these facts did not demonstrate a controversy of "sufficient immediacy and reality." *Id.*

Golden does not control this case. The future injury here is real and substantiated. It does not depend on the unpredictable, uncertain, or unlikely actions of an independent third party. The specific facts establish that when the judges attempt to seek re-election, as they have sworn they intend to do, Michigan law will prohibit them from submitting valid affidavits of candidacy because of their age. *See* Mich. Comp.Laws Ann. § 168.413a (West 1989) (requiring an

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[3] All five judges state in these affidavits that each "intend[s] to seek election to [his present] office at the next election," and that each "will be prohibited from being elected to [that] office by the at issue laws.

incumbent circuit court judge who desires candidacy to file an affidavit attesting, *inter alia*, to being less than seventy years old "by the date of election"); Mich.Comp.Laws Ann. § 168.433a (West 1989) (identical requirement for incumbent probate court judges). Denied the opportunity to submit these affidavits lawfully, the judges will be ineligible for re-election and will have suffered an allegedly cognizable injury to their federal right to equal protection.

In addition to being concrete and particularized, the future injury in this case is also imminent. The Supreme Court's understanding of imminence in *Lujan* is an instructive contrast. In that case, the Court held that the alleged future injury was not imminent because plaintiffs had not shown when the injury was likely to occur. *See* 504 U.S. at 564, 112 S.Ct. 2130. As the Court explained, "the plaintiff alleges only an injury at some indefinite future time." *Id.* at 564, n. 2, 112 S.Ct. 2130.

Here, however, the when is known. Not less than 120 days before the next primary election for their judicial office, the judges must file valid affidavits of candidacy with the Secretary of State in order to be eligible for that primary. *See* Mich.Comp.Laws Ann. § 168.413a (West 1989); Mich. Comp.Laws Ann. § 168.433a (West 1989). The primaries are held in August. For Judges Breck, Preisel, and Schwartz, this means they must attempt to file their eligibility affidavits by or before April of 2000. For Judges Lucas and Montgomery, the filing deadline would be sometime in April of 2002. Thus for three of the judges, the future injury – alleged unconstitutional disqualification from eligibility for state judicial office – will occur, at the latest, in less than a year, and for two of them, in less than three years.

These certain deadlines, in combination with the judges' credible intent to attempt re-election bids, establish that the future injury in this controversy is "certainly impending," not merely allegedly "possible." *Whitmore*, 495 U.S. at 158, 110 S.Ct. 1717 (summarizing cases where plaintiff failed to satisfy imminence requirement because had alleged only "possible future injury"). The State's pure speculation that one, or all, of the judges in this case could be incapacitated due to illness or death before the injury occurs does not alter my analysis. It would be absurd to hold that a plaintiff who desires standing to challenge a certainly impending injury must show that he or she would remain alive and healthy up to the time of injury. *Lujan* in no way suggests that such a showing is necessary.

I hold that the judges have satisfied their burden of proof on summary judgment by demonstrating that the future injury in this case is sufficiently concrete and imminent to satisfy the injury-in-fact element of the standing doctrine. The judges' suits present a controversy appropriate for resolution in an Article III court.

B. Ripeness

The question of ripeness essentially asks whether the judges' suits, while presenting a genuine Article III controversy, are nevertheless premature for judicial resolution. *See Adult Video Ass'n v. U.S. Dep't of Justice*, 71 F.3d 563, 567 (6th Cir.1995). As the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") has explained, "[t]he ripeness doctrine not only depends on the findings of a case and controversy and hence jurisdiction under Article III, but it also requires that the court exercise its discretion to

determine if judicial resolution would be desirable under all of the circumstances." *Brown v. Ferro Corp.*, 763 F.2d 798, 801 (1985), *cert. denied*, 474 U.S. 947, 106 S.Ct. 344, 88 L.Ed.2d 291 (1985). Three factors are to be considered in determining whether the judges' suits are ripe: 1) "the likelihood that the harm alleged by plaintiffs will ever come to pass"; 2) "whether the factual record is sufficiently developed to produce a fair adjudication of the parties' claims"; and 3) "the hardship to the parties if judicial relief is denied at this stage of the proceedings." *Columbus Community Cable Access, Inc. v. Luken*, 923 F.Supp. 1026, 1029-30 (S.D.Ohio 1996) (*citing Adult Video*, 71 F.3d at 568).

As to the first factor, the State relies on the Supreme Court's decision in *Renne v. Geary*, 501 U.S. 312, 321, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991), to support its argument that the judges' sits are not ripe because the harm is too speculative and unlikely. In *Renne*, the Court held that a suit brought by plaintiff political parties, which alleged the unconstitutionality of a provision of the California Constitution that prohibited plaintiffs from endorsing candidates for nonpartisan offices, did not present a "ripe controversy." *Id.* The Court found dispositive the fact that there was no "factual record of an actual or imminent application" of the provision to the plaintiffs "sufficient to present the constitutional issues in 'clean-cut and concrete form.'" *Id.* at 321-22, 111 S.Ct. 2331. The Court noted that "[t]he record also contains no evidence of a credible threat that [the provision] will be enforced." *Id.* at 322, 111 S.Ct. 2331.

I find that the facts here satisfy the ripeness concerns of the Court in *Renne*. The likelihood that the harm alleged by the judges will come to pass is high. There is no dispute that Michigan election law disqualifies the judges from running for re-election on the basis of their age. The judges' affidavits make it plain that they will directly confront the law at issue. Moreover, the State nowhere argues that this law will not be enforced against the judges. Thus the factual record demonstrates a more than "credible threat" of enforcement. *Id.*

The second factor, a sufficiently developed factual record for the purpose of fair adjudication, also supports the judges' position. This is a case that presents only a single legal question. The two facts that play a material role in the fair resolution of that question on summary judgment – the age of each judge at the time of the next elections and their intent to seek re-election despite their age disqualification – are not in credible or serious dispute. The factual record as it now stands would gain no material benefit from further development either by discovery or delay.

The third factor, the hardship to the parties if judicial relief were denied at this time, also favors the judges. A decision now, when the factual record is sufficiently developed, would spare the parties significant hardship because each would have time to prepare their responses to my judgment sufficiently in advance of the 2000 election.

I hold that, in light of all of the circumstances, judicial resolution of this case at this time is desirable and within my discretion. The judges' suits are ripe.

C. Discretionary Jurisdiction Under the Declaratory Judgment Act

The judges seek declaratory and injunctive relief. The State argues that I should decline to exercise my discretionary jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and thereby deny the judges any relief in this case. The State asserts that exercise of my declaratory jurisdiction is improper here because I should not decide issues of constitutional import when the judges assert allegedly speculative future injuries.

It is well established in the Sixth Circuit that jurisdiction to grant relief under the Declaratory Judgment Act is discretionary. *See Aetna Cas. & Sur. Co. v. Sunshine Corp.*, 74 F.3d 685, 687 (6th Cir.1996). The Sixth Circuit has set out five factors to consider in determining whether to exercise declaratory jurisdiction:

> 1) whether the declaratory action would settle the controversy;
>
> 2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue;
>
> 3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for *res judicata*; "
>
> 4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach on state jurisdiction; and

> 5) whether there is an alternative remedy which is better or more effective.

Id. (*quoting Grand Trunk Western Railroad Co. v. Consolidated Rail Corp.*, 746 F.2d 323, 326 (6th Cir.1984)).

All five factors favor exercising my declaratory jurisdiction in this case. First, a declaratory judgment would efficiently resolve this purely legal, as opposed to factual, controversy between the parties. Second, it would also serve a useful purpose in clarifying the legal relations between the parties – guidance all apparently desire as indicated by their cross-motions for summary judgment on the merits. Third, there is no sense here of procedural fencing or of a race for *res judicata*. Fourth, a determination of the federal constitutional question in this case would not improperly encroach on state court jurisdiction. And, fifth, I see no alternative remedy for the judges that would be superior to the one they seek here.

In arguing against the exercise of my declaratory jurisdiction, the State fails to address the Sixth Circuit's *Aetna* est and instead cites to *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 494 (1st Cir.1992), a decision in which the United States Court of Appeals for the First Circuit instructed its lower courts to be "chary about adjudicating constitutional rights by means of declaratory judgment actions" and to address "uncertain questions of constitutional law . . . only when absolutely necessary." The State contends that the equal protection question raised by the judges falls within *El Dia's* category of "uncertain questions" undeserving of federal declaratory jurisdiction.

I disagree. While the judges have raised arguments new in the case law, the equal protection question in this case nevertheless is one that can be resolved with certainty. Moreover, *El Dia* does not control the issue of my declaratory jurisdiction. As case law from outside the Sixth Circuit, it is not controlling precedent, and so to the extent that it advocates tighter constraints on my discretion than that afforded by the Sixth Circuit in *Aetna*, I do not follow it.

I hold that the exercise of my discretionary jurisdiction under the Declaratory Judgment Act is proper in this case pursuant to *Aetna*.

D. Equal Protection Merits

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The judges contend that the State of Michigan violates this constitutional command through election laws that permit some, but not all, incumbent state judges to serve past age seventy. In other words, the judges claim that the way in which the State imposes an age limit on its judicial officeholders – by making a candidate's eligibility depend on age at the time of election – results in an irrational and unfair legislative classification that violates the judges' right to equal protection.

The State and Ms. Bruns contend, on the other hand, that imperfect classifications are not necessarily constitutionally irrational ones. Both argue that the age-based eligibility classification of Michigan election law is a rational means for achieving a variety of legitimate goals the State has

for the structure and composition of its judiciary, including its interest in having efficient, orderly, and democratic transitions between judicial officeholders.

All parties take the correct position that the proper standard to apply to the judges' equal protection challenge is rational basis review. If no fundamental right or suspect classification is at issue in an equal protection case, then the state need only demonstrate that its action bears some rational relationship to some legitimate governmental interest. *See Zielasko v. State of Ohio*, 873 F.2d 957, 959 (6th Cir.1989). Such is the situation here. No fundamental right is at stake; the Supreme Court has held that the right to run for office does not qualify as such. *See Bullock v. Carter*, 405 U.S. 134, 142-43, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). Nor is there a suspect classification here; the Court has determined that age-based classifications do not deserve that label. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

Thus the judges have recourse only to rational basis scrutiny, a level of review that the Court has called "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Dallas v. Stanglin*, 490 U.S. 19, 26, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989). Under such scrutiny, "[c]lassifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the [s]tate's goals and only if no grounds can be conceived to justify them." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). In the end, the essential question of rational basis scrutiny in a case of this kind is not whether the state's classification is a wise, or just, or good, policy decision, but whether it is rational in light of

the state's objectives. *See Murgia*, 427 U.S. at 317, 96 S.Ct. 2562.

Ms. Bruns argues that two cases, *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), and *Zielasko v. State of Ohio*, 873 F.2d 957 (6th Cir.1989), control my answer to this rationality question. In both cases, the reviewing court addressed the issue of whether mandatory retirement laws for state judges satisfied the minimal demands of rational basis scrutiny under the Equal Protection Clause. *See Gregory*, 501 U.S. at 470, 111 S.Ct. 2395; *Zielasko*, 873 F.2d at 961. Both courts held that it did. *See Gregory*, 501 U.S. at 473, 111 S.Ct. 2395; *Zielasko*, 873 F.2d at 961-62. While telling examples of the deferential nature of rational basis scrutiny, *Gregory* and *Zielasko* nevertheless do not act in this case with the force of binding precedent. Neither approached the precise constitutional issue before me: Does the State's method of determining a state judicial candidate's eligibility for office by age at the time of election violate the Equal Protection Clause?

The judges answer that it does because the line drawn by the State has the flavor of arbitrariness. This is the heart of their equal protection challenge. The judges believe that fate's choice of a birthday is a poor way to decide who will have a chance to seek state judicial office.

Maybe that is so. But the truth of that point does not matter in a rational basis examination. The Supreme Court developed rational basis scrutiny in response to the inherent need of the legislative branch to craft politically-acceptable, and thus sometimes rough, solutions to often difficult and pressing policy problems. *See Dandridge v. Williams*, 397

U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) ("The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific"). Rational basis scrutiny therefore "reflect[s] the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Murgia*, 427 U.S. at 314, 96 S.Ct. 2562. "Perfection in making the necessary classifications is neither possible nor necessary." *Id.*

Yet perfection is what the judges would have me require. This I cannot do. As long as the State can demonstrate that its classification is rationally related to a legitimate governmental objective, it has satisfied the Equal Protection Clause. The State asserts that the objectives of its age-based eligibility law are several: to preserve judicial competency; to avoid case- by-case determinations of mental and physical qualifications; to increase judicial opportunities for qualified persons; to avoid the administrative hardships of mid-term retirements; and to accomplish transitions between judicial officeholders through the democratic process rather than through mid-term appointments.

All are legitimate policy objectives. The Michigan election law has some rational relationship to each, but especially the two primary ones: that is, preserving judicial competency and avoiding the disruption of mid-term mandatory retirements. The people of Michigan could have rationally concluded that the inevitable progress of age threatens the competency of their judges, and so an age limit would be a rational means to resolve that concern. The people of Michigan could also have rationally concluded that the best way to implement that age limit was a system of

age-based eligibility for state judicial candidates because such a system would avoid the inefficient disruptions of mid-term retirements imposed by the simple mandatory retirement system of the type approved in *Gregory*.

In the end, the people of Michigan chose a way of screening state judicial candidates that seeks to protect both the competency of the judiciary and its efficiency. Although it may not be a perfect system, it is nevertheless one with several rational bases for its disparate treatment of judicial candidates. That is all the Equal Protection Clause requires. *See Central State Univ. v. Am. Ass'n of Univ. Professors, Central State Univ. Chapter*, --- U.S. ----, 119 S.Ct. 1162, 1163, 143 L.Ed.2d 227 (1999) (holding that a classification "cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose"). The judges' equal protection claim therefore fails.

Conclusion

Accordingly, the judges' motion for summary judgment is DENIED and the State's and Ms. Bruns' motions for summary judgment are GRANTED.

IT IS SO ORDERED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

[Filed November 23, 1998]

No.

HON. DAVID F. BRECK,)
HON. WILLIAM LUCAS,)
HON. CLAYTON E. PREISEL,)
HON. MICHAEL SCHWARTZ,)
HON. GEORGE E.)
MONTGOMERY and all those)
similarly situated,)
Plaintiffs,)
)
v.)
)
STATE OF MICHIGAN,)
MICHIGAN DEPARTMENT OF)
STATE, BUREAU OF)
ELECTIONS, SECRETARY OF)
STATE CANDICE S. MILLER,)
CHIEF ELECTIONS OFFICER,)
and MARLENE M. BRUNS,)
CLERK FOR THE COUNTY)
OF LAPEER.)
Defendants.)

Claim of Unconstitutionality

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in this complaint.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This Complaint is Amended Pursuant to Fed R Civ Pro 15 (a) Amendments are Italicized

NOW COMES the Plaintiffs on their own behalf and as potential representatives of all those similarly situated and in support of their first amended complaint state as follows:

Jurisdictional Allegations

1. Plaintiff David F. Breck is a judge of the Oakland County Circuit Court born on October 31, 1930. Plaintiff Breck will attain the age of seventy on October 31, 2000.

2. Plaintiff Breck's current term of office as a judge of the Oakland County Circuit Court will expire on 12 noon January 1, 2001. The election for the term of office commencing January 1, 2001 will take place on November 7, 2000 which is 7 days after Plaintiff Breck's Seventieth birthday.

3. Plaintiff William Lucas is a judge of the Wayne County Circuit Court born on January 15, 1928.

Plaintiff Lucas attained the age of 70 on January 28, 1998.

4. Plaintiff Lucas's term of office expires on 12 noon January 1, 2003. The election for the term of office commencing January 1, 2003, will occur in November 2002, when Plaintiff Lucas will be 74 years of age.

5. Plaintiff Clayton E. Preisel is a judge of the Lapeer County Probate Court, born on January 29, 1927.

6. Plaintiff Preisel's term of office will expire on 12 noon January 1, 2001, when Plaintiff Preisel will be 73 years of age. The election for the term of office commencing January 1, 2001 will occur in November, 2000 when this Plaintiff will be 72 years of age.

7. Plaintiff Michael Schwartz is a judge of the Macomb County Circuit Court, born on September 23, 1929.

8. Plaintiff Schwartz's office will expire on 12 noon January 1, 2001, when Plaintiff Schwartz will be 71 years of age. The election for the of office commencing January 1, 2001 will occur in November, 2000 when this Plaintiff will be 71 years of age.

9. *Plaintiff George E. Montgomery is a judge of the Macomb County Circuit Court, born on October 16, 1932 and will attain the age of 70 on October 16, 2002.*

10. *Plaintiff Montgomery's office will expire on 12 noon January 1, 2003 when Plaintiff Montgomery will be 70*

years of age. The election for the of office commencing January 1, 2003 will occur in November 5, 2002 which is 20 days after Plaintiff Montgomery's seventieth birthday.

11. Defendant State of Michigan, Michigan Department Of State, Bureau of Elections, Secretary of State Candice S. Miller, are the agency of the State of Michigan and Official charged with responsibility for placing the names of qualified candidates for judge on the ballet for elections to the position of Supreme Court, Court of Appeals, Circuit Court and District Courts in connection with offices occupied by Plaintiffs Breck, Schwartz, *Montgomery* and Lucas.

12. Defendant Marlene M. Bruns is the Clerk for the County of Lapeer and is the Official charged with responsibility for placing the names of qualified candidates for judge of the Lapeer County Probate Court in connection with the office held by Plaintiff Preisel.

13. This action is within the United States District Court's jurisdiction because it presents a federal question arising under the United States Constitution.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C.A. § 1331.

14. The Michigan Constitution provides

> (3) No person shall be elected or appointed to a judicial office after reaching the age of 70 years.
>
> Michigan Const. Art. 6, § 19

15. Michigan law, in addition to the provisions of its constitution, provides in respect to judges of the circuit court:

> A person shall not be eligible to the office of judge of the circuit court unless the person is a qualified elector of the judicial circuit in which election is sought, as provided in section 11 of article 6 of the state constitution of 1963, is licensed to practice law in this state, and, at the time of election, is less than 70 years of age. . .
>
> M.C.L.A. 168.411.

16. Michigan law, in addition to the provisions of its constitution, provides in respect to judges of the probate court:

> A person shall not be eligible to the office of judge of probate unless the person is a qualified elector of the county in which election is sought, as provided in section 16 of article 6 of the state constitution of 1963, is licensed to practice law in this state except as

provided in section 7 of the schedule and temporary provisions of the state constitution of 1963, and, at the time of election, is less than 70 years of age. . .

M.C.L.A. 168.431

17. The United States Constitution provides

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.C.A. Const. Amend. XIV.

COUNT I

DECLARATORY JUDGMENT
EQUAL PROTECTION

18. Plaintiffs hereby incorporate all of the preceding paragraphs by reference as if stated here word for word.

19. An actual or threatened controversy exists between the parties concerning the constitutionality of the provisions of the above quoted sections of the Michigan Compiled Laws and Michigan Constitution.

20. Plaintiff David F. Breck will attain the age of seventy on October 31, 2000.

21. Plaintiff Breck's current term of office as an elected circuit judge for the County of Oakland will expire on 12 noon January 1, 2001.

22. The general election to fill the new term of office now occupied by Plaintiff Breck will take place on November 7, 2000 for the term commencing January 1, 2001.

23. Plaintiff William Lucas is a judge of the Wayne County Circuit Court born on January 15, 1928. Plaintiff Lucas attained the age of 70 on January 28, 1998.

24. Plaintiff Lucas's term of office expires on 12 noon January 1, 2003. The election for the term of office commencing January 1, 2003, will occur in November 2002, when Plaintiff Lucas will be 74 years of age.

25. Plaintiff Clayton Preisel is a judge of the Lapeer County Probate Court, born on January 29, 1927.

26. Plaintiff Preisel's term of office will expire on 12 noon January 1, 2001 when Plaintiff Preisel will be 72 years of age. The election for the term of office commencing January 1, 2001 will occur in November, 2000 when this Plaintiff will be 72 years of age.

27. Plaintiff Michael Schwartz is a judge of the Macomb County Circuit Court, born on September 23, 1929.

28. Plaintiff Schwartz's office will expire on 12 noon January 1, 2001 when Plaintiff Schwartz will be 71

years of age. The election for the term of office commencing January 1, 2001 will occur in November, 2000 when this Plaintiff will be 71 years of age.

29. *Plaintiff George E. Montgomery is a judge of the Macomb County Circuit Court, born on October 16, 1932 and will attain the age of 70 on October 16, 2002.*

30. *Plaintiff Montgomery's office will expire on 12 noon January 1, 2003 when Plaintiff Montgomery will be 70 years of age. The election for the of office commencing January 1, 2003 will occur in November 5, 2002 which is 20 days after Plaintiff Montgomery's seventieth birthday.*

31. Pursuant to Michigan Const. Art. 6, § 19, and M.C.L.A. 168.409, ("the state law") Plaintiff Breck is barred from seeking reelection to the office of circuit court judge because of his seventieth birthday taking place exactly one week prior to the election.

32. Pursuant to Michigan Const. Art. 6, § 19, and M.C.L.A. 168.409, 168.423 ("the state law") Plaintiffs Schwartz, *Montgomery,* Lucas and Preisel, are barred from seeking reelection to their positions because these Plaintiff's will attain the age of 70 prior to the election for the next term of their office.

33. The state law creates three classes of individuals, which are as follows:

Class One	**Class Two**	**Class Three**
Otherwise qualified and eligible to serve as judge	Otherwise qualified and ineligible to run for judge	Otherwise qualified and eligible to serve until term expired
69 years or younger on Date of Election	70 years or older on Date of Election	70-76 years of age during term of service if election occurs during age 69

34. Plaintiff Breck is a "class two" person, who by virtue of a **seven day** period of gestation would be a "class one" person eligible to seek re-election to his office for a term which would expire on January 1, 2007 when Plaintiff Breck would be 76 years of age, having served the last term as a "class three" person.

35. Plaintiff Lucas is a member of Class Three during his current term and a member of Class Two for an upcoming term.

36. Plaintiff Schwartz is a member of Class Three during his current term and a member of Class Two for an upcoming term.

37. *Plaintiff Montgomery is a member of Class Three during his current term and a member of Class Two for an upcoming term.*

38. Plaintiff Preisel is a member of Class Three during his current term and a member of Class Two for an upcoming term.

39. Defendants are charged with the responsibility of carrying out the provisions of the state law, and are expected to in accordance with such obligations, to refuse to place the names of Plaintiffs on the ballet for the term following each of the Plaintiffs current term. Such refusal would be occasioned solely because of the provisions of the state law pertaining to age as described above.

40. The Michigan state law's operation is logically perverse. It permits, and defines that those persons who by happenstance of the calender turn seventy years one day *post* election are age qualified until 76 years of age, but conversely defines a person who turns 70 the day of the election (or 1 week before in the case of Plaintiff Breck) to be age disqualified.

41. Likewise, the perversity of Michigan law, has created a class of persons who are age qualified to serve up to age 70-74, in the cases of Plaintiffs Lucas, Schwartz, *Montgomery* and Preisel, but may not run in an election to serve until age 76, being legally defined as age disqualified.

42. Those persons legally defined as qualified (the Class Three persons) to sit as judges who actually are permitted to serve in the years of 70-76 years of age comprise a class of individuals receiving preferred treatment under the law.

43. Those persons legally defined as not qualified (the Class Two persons) to sit as judges because the election takes place in their 70th year of life, albeit, even occurring on the 70th birthday of such person, are legally disqualified to sit as judges during the 70-76th years of their life and comprise a class of individuals receiving inferior treatment under the law.

44. There is no rational basis for the creation of these two classes of persons. The state law involved permits *some* persons between 70 and 76 to serve as age qualified, and determines *some other* persons between ages 70 and 76 to be age disqualified.

45. The United States Constitution provides that all citizens are entitled to equal protection of the law. It provides

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S.C.A. Const. Amend. XIV.

46. Laws which limit a class of individuals from seeking public office on the basis of their age must be rationally related to some legitimate goal.

47. A law which simply declares a flat prohibition among all persons exceeding a certain age from holding a particular position or office may or may not be a denial of equal protection based upon a determination

of a rational link between the prohibition and the object of the legislation.

48. A law which declares that *some* 70-76 year old persons are fit to be judges and *other* 70-76 year old persons are not simply deletes a pool of otherwise eligible candidates from the choices available to the public with no rational distinction between the prohibited candidates and any legislative goal because candidates of the same age group do in fact continue on in office, and are presumed to be age-fit while others of the exact same age group are presumed to be unfit by age and may not continue in judicial office.

49. The absence of a rational basis for distinguishing between two competing groups of persons between the ages of 70 - 76 violates the 14th amendment of the United States Constitution by denying equal protection of the laws to the "presumed unfit" class of otherwise qualified persons described above.

WHEREFORE Plaintiffs pray that this Honorable Court declare Michigan Const. Art. 6 § 19, M.C.L.A. §§168.409 and 423 unconstitutional and unenforceable under the United States Constitution, and award any other further relief as is consistent with equity and/or good conscience, including but not limited to an order directing that these Plaintiffs names be placed upon the ballet should they fit all other criteria required by law except for the unconstitutional age provisions described herein.

Respectfully submitted,

/s/

Mayer Morganroth P17966
Attorney for Plaintiffs
3000 Town Center
Suite 1500
Southfield, MI 48075
248-355-3084

/s/

Michael J. Lebow
Attorney for Plaintiffs
31420 Northwestern Highway
Suite 120
Farmington Hills, MI 48334
248-851-4300

Dated: November 18, 1998

APPENDIX D

AFFIDAVIT OF HON. DAVID F. BRECK

I, David F. Breck, declare under penalty of perjury that the following statements are true, based upon my personal knowledge and, if sworn as a witness, I can testify competently to the facts stated herein.

1. I currently serve as a judge of the Sixth Judicial Circuit Court of Michigan.

2. I intend to seek election to this office at the next election.

3. I am in good health and do not have any physical or mental disabilities that will prevent me from seeking or holding office.

4. I will be one week beyond my 70th birthday at the time of the next election for this office.

5. I will be subject to the laws at issue in this action at the time of the election.

6. I will be prohibited from being elected to the office by the at issue laws.

7. The Oakland County Election Commission has indicated that I will not be listed on the ballot for the next election to the office because the laws at issue in this action prohibit my election to the office.

Further, affiant sayeth not.

/s/_____
David F. Breck

Subscribed and sworn to me this
17th of March. 1999.

/s/_____
Notry Public, Oakland County, MI
My Commission expires: 10-9-00

AFFIDAVIT OF HON. WILLIAM LUCAS

I, William Lucas, declare under penalty of perjury that the following statements are true based upon my personal knowledge and, if sworn as a witness, I can testify competently to the facts stated herein.

1. I currently serve as a judge of the Third Judicial Circuit Court of Michigan.

2. I intend to seek election to this office at the next election.

3. I am in good health and do not have any physical or mental disabilities that will prevent me from seeking or holding office.

4. I will be beyond my 70th birthday at the time of the next election for this office.

5. I will be subject to the laws at issue in this action at the time of the election.

6. I will be prohibited from being elected to the office by the at issue laws.

Further, affiant sayeth not.

/s/_____
William Lucas

Subscribed and sworn to me this
12th of March, 1999.

/s/_____
Notry Public, Wayne County, MI
My Commission expires: 4/15/2000

AFFIDAVIT OF HON. CLAYTON E. PREISEL

I, Clayton E. Preisel, declare under penalty of perjury that the following statements are true, based upon my personal knowledge and, if sworn as a witness, I can testify competently to the facts stated herein.

1. I currently serve as a judge of the Lapeer Count Probate Court of Michigan.

2. I intend to seek election to this office at the next election.

3. I am in good health and do not have any physical or mental disabilities that will prevent me from seeking or holding office.

4. I will be beyond my 70th birthday at the time of the next election for this office.

5. I will be subject to the laws at issue in this action at the time of the election.

6. I will be prohibited from being elected to the office by the at issue laws.

Further, affiant sayeth not.

/s/_____
Clayton E. Preisel
3/12/99

Subscribed and sworn to me this
12th of March 1999.

/s/_____
Notry Public for Lapeer County, MI
My Commission expires: 5/19/01

AFFIDAVIT OF HON. GEORGE E. MONTGOMERY

I, George E. Montgomery, declare under penalty of perjury that the following statements are true, based upon my personal knowledge and, if sworn as a witness, I can testify competently to the facts stated herein.

1. I currently serve as a judge of the Sixteenth Judicial Circuit Court of Michigan.

2. I inend to seek election to this office at the next election.

3. I am in good health and do not have any physical or mental disabilities that will prevent me from seeking or holding office.

4. I will be beyond my 70th birthday at the time of the next election for this office.

5. I will be subject to the laws at issue in this action at the time of the election.

6. I will be prohibited from being elected to the office by the at issue laws.

Further, affiant sayeth not.

/s/_____
George E. Montgomery

Subscribed and sworn to me this
17th of March, 1999.

/s/_____
Notry Public Macomb County, MI
My Commission expires: 7/30/02

AFFIDAVIT OF HON. MICHAEL SCHWARTZ

I, Michael Schwartz, declare under penalty of perjury that the following statements are true, based upon my personal knowledge and, if sworn as a witness, I can testify competently to the facts stated herein.

1. I currently serve as a judge of the Sixteenth Judicial Circuit Court of Michigan.

2. I intend to seek election to this office at the next election.

3. I am in good health and do not have any physical or mental disabilities that will prevent me from seeking or holding office.

4. I will be beyond my 70th birthday at the time of the next election for this office.

5. I will be subject to the laws at issue in this action at the time of the election.

6. I will be prohibited from being elected to the office by the at issue laws.

Further, affiant sayeth not.

/s/_____
Michael Schwartz

Subscribed and sworn to me this
15th of March, 1999

/s/_____
Notry Public Macomb County, MI
My Commission expires: 3/17/2000